



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

APR 17 2012

James C. Dalton
Chief, Engineering and Construction
Directorate of Civil Works
U.S. Army Corps of Engineers
441 G Street, N.W.
Washington, D.C. 20314-1000

Dear Mr. Dalton:

On February 17, 2012, the U.S. Army Corps of Engineers (COE) published a notice in the *Federal Register* (77 FR 9637) to update its process to request a variance from vegetation standards for levees and floodwalls. The National Marine Fisheries Service (NMFS) appreciates your comments.

As you may be aware, NMFS has worked with the COE on a regional level to develop collaborative partnerships of Federal, State, and local officials to address vegetation issues affecting the State-federal levee system in the Central Valley of California and the Seattle District in Washington. NMFS believes those collaborative partnerships have been a very fruitful approach to addressing Endangered Species Act concerns related to levee maintenance. As these regional initiatives may be impacted by the proposed process, we are submitting formal comments on the variance request process.

Thank you for your consideration of these comments.

Sincerely,

Helen M. Golde
Acting Director,
Office of Protected Resources



Printed on Recycled Paper



National Marine Fisheries Service (NMFS) comments on the February 2012 version of the Policy Guidance Letter for *Federal Register* Notice deadline April 17th, 2012.

Context for NMFS comments

Salmon are listed under the Endangered Species Act (ESA) throughout major portions of Washington, Oregon, Idaho, and California. Most levees were originally placed very close to the river's edge across this broad geography. Thus the levees are often what comprise the riparian corridor for many watersheds, and the woody vegetation on these levees provides the needed riparian habitat functions for salmon critical habitat and ESA-listed species' life history needs. While NMFS shares the goal of public safety with the U.S. Army Corps of Engineers (USACE) regarding levee integrity, both public safety and the habitat needs of ESA-listed salmon need to be properly addressed. To address one of these objectives without also addressing the other creates conflicts between P.L. 84-99 and the ESA and makes it difficult to comply with both mandates. Our comments below are crafted to assist the USACE with meeting levee integrity objectives while also meeting environmental objectives to protect ESA-listed salmon habitat requisites on levees.

Proposed PGL, subpart (4) Background. One of the overall authorities for USACE programs is the Water Resource Development Act (WRDA 1996). Section 202(g) of WRDA 1996 directed the USACE to address regional variations in levee management and resource needs. We believe that recognizing *regional variation* in soils, climate, hydrograph, vegetation, development patterns, and *environmental compliance* with local, state, or federal obligations means that standards for managing levee vegetation under Public Law 84-99 should not be applied in the same way nationwide. However, the proposed Policy Guidance Letter (PGL) will make regional variances more difficult to obtain compared to the existing (2001) variance procedures. NMFS believes (1) this is a fundamental misinterpretation of Section 202(g) and (2) that the PGL that rescinds USACE variance procedures (Engineering Regulation 500-1-1 and Engineering Pamphlet 500-1-1, 30 September 2001) is more than "an internal document" since it has on-the-ground effects throughout the USACE's Seattle District.

In contrast to the USACE's developing the PGL as a national program with final decisions made at Headquarters USACE, we note another USACE national program that addresses regional factors and concerns—the Nationwide Permit Program. By developing and applying regional conditions for Nationwide Permits, the USACE appears to suitably tailor and limit how those permits are used to address regional variations, including many of the technical and policy variations relevant for aquatic resources. Similarly, we recommend that the PGL include an analogous provision for regional compliance and decision-making for levee maintenance activities.

Proposed PGL, subpart (5) Definitions. While the definition of "levee system" seems open to interpretation, we believe it is too narrowly defined to be widely useful. In the Seattle District, a

single segment of river protected by several separate levees may extend for several miles, with each levee defined as a separate “levee system,” as the proposed PGL has been explained to work groups and public meetings. The high cost and time to prepare separate variance requests for each of several levees (that may function together to protect a single river segment) will be an unnecessary barrier to effective levee management. We suggest a definition of “levee system” that acknowledges that all qualifying levees within a functional segment of a river compose a single “levee system.” All rivers nationwide have already been described as a series of sub-watersheds (i.e., 6th field hydrologic unit codes [HUCs]) that contain functional river segments or reaches. For those rivers that do not also have functional reaches described within local watershed plans, the 6th field HUC would be a suitable starting point to define a “levee system.”

Proposed PGL, subpart (6) Eligibility requirements for requesting regional variance. Here the USACE appears to create a threshold requirement that applicants must meet before their request for vegetation variance can even be considered. It is not clear how this threshold can be met. The “request must demonstrate that a variance is the only reasonable means to” comply with applicable laws concerning the environment, or protect treaty rights, or “address a unique environmental consideration, such as to maintain sensitive species populations and to preclude the need for future federal listing under the ESA...” The three criteria raise many questions.

We urge the USACE to bear in mind that honoring treaty rights and meeting environmental laws including the ESA are federal obligations, but this requirement appears to shift the federal burden to a levee sponsor. Levee sponsors are often local jurisdictions or even smaller political subdivisions such as flood control or diking districts. We suggest the language at 6 a. change from “a variance is the only reasonable means...” to “a proposed variance is a reasonable means...”. Also, the requirement to show that a proposed variance is the “only reasonable means” places unreasonable obligations on a levee sponsor.

This section is also awkwardly drafted. It states a threshold criterion (6a), then proceeds with 11 subparagraphs when the threshold is not applicable (6b, c, d). We suggest redrafting the entire subsection on eligibility in a more straightforward manner, making clear the limited circumstances in which a threshold showing is required (e.g., “for any levee maintained by a party other than the USACE, and for which a variance is not currently in place, the levee sponsor must demonstrate how vegetation retention exceeding the PL84-99 national standard meets one or more of the following: State/Federal water quality standards, Tribal Treaty rights, protection of ESA listed species and/or their habitat, while retaining structural integrity and inspectability.”)

Proposed PGL, subpart (7) Process. NMFS remains concerned about the approval sequence and timeframes, even though this draft improves somewhat on the sequence in the February 2010 draft. The one-year period for levee sponsors to develop an initial letter indicating that they would like their existing variance to remain in effect while they either engage in System-Wide Improvement Frameworks (SWIF) or variance procedures appears suitable. Currently there is a vegetation variance within the Seattle District. However, the result of mandating each sponsor to

individually request either retention of the Seattle District variance or a new variance is overly bureaucratic. It will also likely result in lapsing of the existing variance in some areas where ESA-listed fish will then be exposed to less functional riparian woody vegetation, since the sponsor must manage to the national standard absent a new variance request under this policy. Adverse effects on critical habitat will be coupled with adverse effects on some populations of ESA-listed salmon and steelhead in Washington.

The proposed timetable of an additional year to submit documentation in support of the variance seems difficult, if not impossible, to achieve, because of the ambiguous nature of the threshold criteria (as described earlier in this document) and uncertainty about how environmental compliance will be achieved. Also, it appears there are no time-frames for decisions throughout this process except for the 90-day Agency Technical Review (ATR). We urge the USACE to provide target timeframes for District Engineer endorsement, the MSC LSO review, the MSC endorsement, and the final HQUSACE Levee Safety Officer (LSO) decision. Also, there currently is no appeal process identified for a rejected variance proposal submitted under the revised PGL. This needs a remedy. As mentioned in all our earlier correspondence and comments on this PGL process, NMFS urges decision-making at the Major Subordinate Command (MSC)/Division level. As mentioned earlier in this document, the USACE permits regional conditions in the Nationwide Permit Program. For many of the same reasons MSC/Divisional decision-making is the correct course here. NMFS recommends that each level of review and approval have a timeframe of no more than 30-60 days. We believe that more levee sponsors will participate in a process that has timeframes for decisions better defined.

Proposed PGL, subpart (11) Environmental Compliance. The USACE requires the levee sponsor to provide all background studies, data, and other information required by the USACE to complete National Environmental Policy Act (NEPA), ESA reviews, and any other applicable environmental resource protection statute. This documentation must demonstrate effects of the variance *and* of the national standard. But the lack of previously completed environmental review of the national standard is problematic. Insistence on a review of national standard can be interpreted as the USACE shifting the burden of analysis of its national program and standard to local sponsors, *as well as* a review of effects that would occur in a local variance from the program standards. Importantly for NMFS, within the context of the ESA, there is no clear federal nexus through which that demonstration can take place with a local sponsor. This uncertainty places local sponsors in a difficult tangle of conflicting federal requirements.

Proposed PGL, subpart (12) Submittal Process for New Vegetation Related Science and Technology. While the USACE insists that an entity submitting new science for consideration must be peer-reviewed, much of the USACE's existing technical guidance for levee vegetation has not been peer-reviewed. Peer review of existing USACE technical guidance for levee vegetation should be a priority, and new science from any relevant source should be considered.

ESA Consultation. The national standard for levee vegetation maintenance under P.L. 84-99 has never been through ESA section 7 consultation. NMFS would like to meet with the USACE and U.S. Fish and Wildlife Service to discuss whether a national programmatic consultation is required in this case.